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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE,

Plaintiff and Respondent,

v.

JUAN CARLOS CAMACHO
et al.,

Defendants and Appellants.

B292093

(Los Angeles County
Super. Ct. No. TA144840)

APPEAL from judgments of the Superior Court of Los Angeles County, Julian C. Recana, Judge. Affirmed in part, reversed in part, and remanded for further proceedings.

Ava R. Stralla, under appointment by the Court of Appeal, for Defendant and Appellant Juan Carlos Camacho.

Law Offices of Austin R. Dove, Austin R. Dove, for Defendant and Appellant Adan Muniz.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant

Attorney General, Scott A. Taryle and David E. Madeo, Deputy Attorneys General, for Plaintiff and Respondent.

I. INTRODUCTION

A jury convicted defendants and appellants Juan Carlos Camacho and Adan Muniz of assault with a deadly weapon (Pen. Code, § 245, subd. (a)(1)¹) and willful, deliberate, and premeditated attempted murder (§§ 664/187, subd. (a)). The jury found true the allegation that the offenses were committed for the benefit of, at the direction of, and in association with a criminal street gang with the specific intent to promote, further, and assist in criminal conduct by gang members. (§ 186.22, subd. (b)(1)(C).) It further found true the allegation that in the commission of each offense Muniz personally inflicted great bodily injury on the victim. (§ 12022.7, subd. (a).) The trial court found true the allegations at to both offenses that Camacho had two prior serious and/or violent felony convictions (§§ 667, subds. (a)(1) & (b)-(j); 1170.12, subd. (b)) and served two prior prison terms (§ 667.5, subd. (b)) and Muniz served one prior prison term (§ 667.5, subd. (b)). The trial court sentenced Camacho to 45 years to life in state prison and Muniz to 13 years to life in state prison.

On appeal, Camacho contends insufficient evidence supported the gang enhancement findings; the trial court erred in allowing the prosecution to use one of his bifurcated prior convictions as a predicate offense to prove the gang enhancement

¹ All further statutory references are to the Penal Code unless otherwise noted.

allegations; we must reverse his conviction for premeditated attempted murder in light of Senate Bill No. 1437 which abrogated the natural and probable consequences doctrine; if we reject his Senate Bill No. 1437 contention, then the trial court erred in failing to instruct the jury that he had to act with premeditation in committing the willful, deliberate, and premeditated attempted murder; we should remand the matter to allow the trial court to exercise its discretion whether to strike his section 667, subdivision (a) sentence enhancements as provided by Senate Bill No. 1393; the trial court erred in imposing a consecutive 10-year gang sentence enhancement; and we should strike his section 667.5, subdivision (b) prior prison term sentence enhancements as provided by Senate Bill No. 136.

Muniz contends the trial court erred in denying his motion to disclose the identity of a confidential informant; the court erred in failing to bifurcate trial on the gang enhancement allegations; insufficient evidence supported the assault with a deadly weapon and willful, deliberate, and premeditated attempted murder offenses; and insufficient evidence supported the gang enhancements.

We reverse Camacho's and Muniz's section 667.5, subdivision (b) prior prison term sentence enhancements and remand the matter for the trial court to exercise its discretion whether to strike Camacho's section 667, subdivision (a) sentence enhancements and for the court to strike Camacho's and Muniz's section 186.22, subdivision (b)(1)(C) 10-year terms and impose 15-year minimum parole eligibility terms under section 186.22, subdivision (b)(5). We otherwise affirm.

II. BACKGROUND

On May 20, 2017, Camacho and his girlfriend, Maribel Sanchez, lived in a house on West Reeve Street in Los Angeles. Maribel's sister, Elizabeth Sanchez, also lived in the house. Maribel and Elizabeth's sister, Mariana Sanchez, and her fiancé, Jose Duran, lived in a building or back room on the property.

Duran, known as "Wolf," Mariana, known as "Crazy," and Elizabeth had been members of the Compton Vato 70 (CV70) gang. On May 20, 2017, they were no longer active in the gang. Camacho, known as "Stomper," and Maribel were members of the Compton Vato Tres (CV3) gang. According to Duran, CV70 and CV3 were rival gangs.

In the early morning of May 20, 2017, Elizabeth went to the back room and asked Mariana to come to the house to speak to her about something. When Mariana entered the house, Elizabeth was in the hallway and Camacho and Maribel were in a bedroom. Elizabeth was upset that someone had used her cell phone to remove money from her boyfriend's tax account. When Mariana said that she had been in the back room, Elizabeth turned to Maribel.

Duran entered the house. He knew "they" were on drugs and told Mariana, "[T]hey are tweakers. Leave them alone." Camacho was offended at being called a "tweaker." Duran said, "If you associate with one, you will be considered one." Camacho punched Duran in the mouth. Duran told Camacho to fight him outside.

Duran and Camacho fought and fell to the ground. Duran believed he won the fight. Although Camacho hit him in the face,

he was not injured. Duran “busted” Camacho’s lip. A neighbor told them to stop fighting, and they complied.

After the fight, Duran threw his bike over the fence—the gate was locked and he did not have a key—and jumped over. He went across the street to speak with and get help from his friend Luis, a CV70 gang member. Luis was not home. At the same time, Camacho and Maribel talked on the porch.

Mariana went inside the house and confronted Elizabeth about the problem she had caused. Camacho joined the argument, also confronting Elizabeth. Maribel was speaking on the phone two to three feet from Mariana. Mariana could hear her conversation. Maribel said, “Some shit is going down.” She also said, “Well, Stomper got down with Wolf from 70s, and because Jose had run across the street.” She said, “[H]e is from 70s, and because Stomper [is] from CV3, it is a hood matter now.”²

At some point during Mariana’s argument with Elizabeth, Maribel asked Elizabeth for the front gate key. Elizabeth handed Maribel the key and Maribel walked out the front door.

Unable to speak with Luis, Duran returned home. Believing Camacho had treated him disrespectfully, Duran confronted Camacho, saying, “Round 2.” At first, Camacho did not want to fight, but ultimately agreed. As Duran and Camacho fought, Camacho pinned Duran’s back against a van. According to Duran, Camacho “switched [him] over” so he was facing the

² A Los Angeles County Sheriff’s Department detective testified that Mariana told him Maribel said, “Hey, there is shit going down with the 70. You need to come through. This is CV3 all the way.” That statement does not appear in the apparent recorded transcript of the interview played for the jury.

van. Duran and Camacho were “locked”—Duran did not know why Camacho held him for so long. Then, Duran “was seeing stars and [his] lights went out.”

Mariana remained inside talking with Elizabeth. Mariana heard Duran and Camacho fighting. After a couple of minutes, she heard Duran make a “weird like gag noise.” Mariana looked out the window and saw a hand and a hammer.

Mariana ran outside. Maribel stood holding the gate key. The gate was open. Duran was on the ground on one knee, trying to keep himself upright by holding onto the van. He then dropped down on all fours. Camacho stood in front of Duran and Muniz stood behind Duran. Muniz was swinging a hammer downward on top of Duran’s head. Muniz struck Duran’s head two to three times causing blood to splatter from Duran’s head. As Muniz struck Duran with the hammer, Camacho punched Duran in the face two or three times. Duran was not armed with a weapon during the fight and, as far as Duran knew, Camacho was not armed.

Trying to shield Duran, Mariana ran between him and Camacho and Muniz. Camacho backed away. As she hugged Duran, Muniz struck her on the neck with the hammer four times. Mariana grabbed the hammer and Muniz yelled at her to let go of it. They struggled over the hammer. Elizabeth came outside and yelled, “That is my sister.” Elizabeth grabbed the hammer and Muniz and Mariana both let it go.

Duran was unconscious. Mariana called out to him, but there was no response. She pulled on him and he “kind of woke up.” Mariana guided Duran back to their room. Duran had two deep holes on the top of his head and was bleeding.

Muniz yelled for Mariana to bring out Duran. Mariana stood outside in front of her and Duran's room to prevent Muniz from entering. Muniz reached for a gun in his pants. Mariana refused to bring out Duran.

After Mariana refused to bring out Duran, she and Muniz calmed down and had a conversation. Muniz said "[h]e received a call saying because Jose was from 70s and he was from, I guess, a different gang, Mr. Camacho, that is why he was there." Mariana told Muniz that it was a family matter. Muniz responded, "Well, this is my brother-in-law. I am here to back him up." Mariana insisted it was a family matter and she "started explaining to him how the issue happened."

Muniz grinned and said to Mariana, "[Y]ou should be on a reality show for families." Muniz and Mariana shook hands, and Muniz said, "My bad for hitting you with the hammer." He said he did not know that she was "the sister." Muniz and Camacho left the property.

Mariana called 911. In the call, she described Duran's attackers as "just Mexican, bald headed and that's it." Later in the call she said, "One was wearing some blue shorts and a black shirt and the other was wearing a sweater." At first, Mariana said the assailants "ran" and that she did not know where they went, then she said she was unsure if they left on foot or in a car, and finally she said that she was pretty sure they left in a car. When Sheriff's Department deputies arrived, Mariana described the assailant with the hammer as "30 to 35 years old, 5' 11", with a dark complexion, thin build, and bald head.

On December 7, 2017, Mariana identified Muniz from a group of six photographs (photo array) as the man who struck Duran with hammer. Mariana was sure of her identification. At

trial, Muniz's counsel asked Mariana, "Would it change your mind if you knew Mr. Muniz was 24 years old on that day?" Mariana responded, "He don't look that age to me. He looks older." Muniz's counsel represented that he was 5' 7" and had Muniz stand next to him. He then asked Mariana if there was any chance Muniz was 5' 11". Mariana said, "No." Muniz's counsel then asked, "It couldn't possibly have been Mr. Muniz?" Mariana responded that Muniz was the assailant with the hammer and she was "not good with heights."

Mariana admitted that she had given several different versions of what happened on May 20, 2017, and added some significant details. She explained that she did not tell the full story "at the beginning." She stated, "[I] was lying about it, especially when they went to pick up [Duran], the paramedics. I did lie about it. I didn't want to get involved with the court and none of that, but at the end of the day, my husband is going through a long recovery. It's not fair for him for me to just keep my mouth shut and let the people who did it walk away. It is not fair."

Los Angeles Sheriff's Department Detective Eric Gomez testified as the prosecution's gang expert. According to Detective Gomez, members of the same gang typically help one another commit crimes. A gang member is required to help if a fellow gang member asks for help. The failure to provide help could result in negative consequences including beatings or expulsion from the gang.

Detective Gomez was familiar with the CV3 gang. He knew Camacho and Muniz to be CV3 gang members. Camacho had the moniker "Stomper." Detective Gomez had not had contact with Camacho for over five years. He last had contact

with Muniz in 2013. Detective Gomez did not know CV70 and CV3 normally to be rival gangs.

The prosecutor gave Detective Gomez the following hypothetical fact pattern and asked whether the “crime could be committed for the benefit of, at the direction of, or in association with a criminal street gang, with a specific intent to promote or further or assist in criminal conduct by members of that gang”:

“[A]ssume gang member A is a member of the Blue gang, and gang member A gets in a fight with a member of a Yellow gang. That fight ends. Gang member A then has a conversation with his girlfriend, who also happens to be a member of Blue gang. The girlfriend—this is happening at a home. The girlfriend goes inside of the home, makes a phone call. As the girlfriend is making this phone call, a witness present at this home walks inside and overhears this conversation and hears the girlfriend tell the person on the phone that some shit is going on with the Yellow gang, this is the Blue gang, and this is some hood shit.

“Following this phone call, minutes later, gang member A and the member of the Yellow gang starts to fight again. As they are fighting, another individual, gang member B, is also a member of the Blue gang, shows up with a hammer, striking the member of the Yellow gang three times in the head, while gang member A is also punching this person all over his body. The witness tries to intervene, and gang member B reaching towards his waistband towards a gun and wants to continue fighting. Gang member B then tells the witness that he was told that something was happening and that this was a hood thing.”

Based on the hypothetical fact pattern, Detective Gomez opined that the second fight was for the benefit of the Blue gang.

He testified, “I think the fact that the gang member A from the Blue gang and the other individual from Yellow gang, their fight is one thing, but as soon as the phone call is made and statements are made regarding this is against the Yellow gang and that this is a hood thing, then it does become a gang incident.

“I believe the other Blue gang member that shows up with a hammer and starts attacking the Yellow gang member is also in support of the gang incident.

“I think with all of that, yes, it is in the benefit of the gang, because—at the beginning it is just a fight between Yellow and Blue. But once the other Blue shows up and they jump in and he starts attacking him with the hammer, it becomes pretty much a beat down, and I think that that is—he is helping out his fellow gang member. I believe it instills fear in the Yellow gang, showing that individual from the Yellow gang and whoever sees him in the hospital that this is what happens when you mess with the Blue gang.

“I think anybody—any witnesses that are neighbors that happen to be walking down the street or looking out a window or looking out a car and sees this happening, I believe that also instills fear in them, showing that this is what could possibly happen to you if you go against anything or if you attack or get into a fight with someone from the Blue gang. So it benefits the Blue gang by bolstering their street credit or intimidation among people, neighbors, people on the street, which in turn would allow them to continue with any type of criminal enterprise, such as dealing drugs or committing street robberies for fear that if they go against this Blue gang, this could possibly be what happens to you if you go against Blue.”

Detective Gomez added that the third Blue gang member would have been working in association with the first Blue gang member. There would have been consequences for the third Blue gang member had he not shown up and backed up the Blue gang after receiving a call that there was an issue between the Blue and Yellow gangs.

According to Detective Gomez, people get in fights, even if they are gang members, because they are mad at each other. Sometimes, people get in fights because their girlfriends are mad at each other.

III. DISCUSSION

A. *Nondisclosure of Confidential Witness*

During the preliminary hearing, Detective Jose Arias testified that after receiving information from a confidential informant, he included Muniz's photograph as part of a photo array that he showed to Mariana. Mariana chose the photograph of Muniz as being the person who had struck Duran with a hammer. On April 4, 2018, Camacho filed a motion to disclose the identity of the confidential informant. Muniz joined in the motion. On April 30, 2018, the trial court conducted an in camera hearing and denied the motion, concluding that the informant was not a material witness.

Muniz contends that the trial court erred and requests that we review the sealed reporter's transcript for April 30, 2018, to determine whether there was any such error.

The prosecution must disclose the name of an informant who is a material witness in a criminal case or suffer dismissal of

the charges against the defendant. (*Eleazer v. Superior Court* (1970) 1 Cal.3d 847, 851.) An informant is a material witness if there appears, from the evidence presented, a reasonable possibility that he or she could give evidence on the issue of guilt that might exonerate the defendant. (*People v. Borunda* (1974) 11 Cal.3d 523, 527.) “However, an informant is not a material witness when “he simply points the finger of suspicion toward a person who has violated the law” [Citation.]” (*People v. Wilks* (1978) 21 Cal.3d 460, 469.) We review the trial court’s ruling concerning the disclosure of a confidential informant under the abuse of discretion standard. (*People v. Hobbs* (1994) 7 Cal.4th 948, 976.) Here, based on our review of the sealed transcript, we hold that the trial court did not err in denying disclosure of the in camera hearing and in sealing the transcript.

B. *Bifurcation of Gang Allegation*

Muniz contends the trial court erred in failing to bifurcate the trial on the gang allegations. The Attorney General argues Muniz forfeited this issue by failing to move for bifurcation in the trial court. We agree with the Attorney General. (*People v. Hinton* (2006) 37 Cal.4th 839, 894 [the failure to object to the admission of evidence forfeits the issue on appeal]; *People v. Pinholster* (1992) 1 Cal.4th 865, 935 [questions relating to the admissibility of evidence are forfeited in the absence of an objection in the trial court].)

C. *Sufficiency of the Evidence*

Muniz contends that insufficient evidence supported his assault with a deadly weapon and willful, deliberate, and premeditated attempted murder convictions. Muniz and Camacho argue that insufficient evidence supported the gang enhancement findings. Sufficient evidence supported the convictions and gang enhancement findings.

1. Standard of Review

“When considering a challenge to the sufficiency of the evidence to support a conviction, we review the entire record in the light most favorable to the judgment to determine whether it contains substantial evidence—that is, evidence that is reasonable, credible, and of solid value—from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.’ [Citation.] We determine ‘whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.’ [Citation.] In so doing, a reviewing court ‘presumes in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence.’” (*People v. Edwards* (2013) 57 Cal.4th 658, 715.) “A reversal for insufficient evidence ‘is unwarranted unless it appears “that upon no hypothesis whatever is there sufficient substantial evidence to support” the jury’s verdict.’” (*People v. Zamudio* (2008) 43 Cal.4th 327, 357.) The same standard applies to a claim that insufficient evidence supported a jury’s gang

enhancement finding. (*People v. Villalobos* (2006) 145 Cal.App.4th 310, 321–322.)

2. Substantive Offenses

Muniz argues insufficient evidence supports his assault with a deadly weapon and attempted murder convictions because Mariana’s identification of him as the assailant with the hammer was unreliable and inconsistent. We disagree.

Muniz argues that “three substantial inconsistencies” in Mariana’s testimony “prohibit[ed]” a rational trier of fact from finding her credible. First, Mariana offered different accounts of whether the assailants left together or separately and whether they left in a car or on foot. Second, she offered different accounts of which assailant was armed with a gun. Third, she admitted lying about the incident and adding significant details. Mariana’s identification³ of Muniz as the assailant with the hammer also is not credible, Muniz argues, because he did not match the physical description Mariana gave of the assailant.

“In deciding the sufficiency of the evidence, a reviewing court resolves neither credibility issues nor evidentiary conflicts. [Citation.] Resolution of conflicts and inconsistencies in the testimony is the exclusive province of the trier of fact. [Citation.] Moreover, unless the testimony is physically impossible or

³ Muniz notes that his counsel, in closing argument, pointed out “problems” with the photo array—Muniz was the only one wearing a red shirt, his photo was first in the array, and he was the baldest man in the array. Muniz does not argue that the photo array was unduly suggestive rendering Mariana’s identification a due process violation. (See *People v. Avila* (2009) 46 Cal.4th 680, 698.)

inherently improbable, testimony of a single witness is sufficient to support a conviction. [Citation.]” (*People v. Young* (2005) 34 Cal.4th 1149, 1181.)

Mariana identified Muniz from a photo array pretrial as the assailant who struck Duran with the hammer and was sure of her identification. She again identified defendant at trial as the assailant with the hammer. It was the jury’s role to resolve any issues with Mariana’s credibility. (*People v. Young, supra*, 34 Cal.4th at p. 1181.) Mariana’s identification of Muniz was neither physically impossible nor inherently improbable. Accordingly, it was sufficient to support Muniz’s conviction. (*Ibid.*)

3. Gang Enhancements

Camacho and Muniz argue that insufficient evidence supports the gang enhancement findings because the evidence shows that the assault and attempted murder were committed for personal and not gang reasons. We disagree.

Camacho argues, “The incident itself began as a family matter. That Mariana heard Maribel on the phone talking to someone and referring to CV3 and a ‘hood matter,’ did not necessarily make the resulting assault with a hammer on Duran a gang case.” Principally, Camacho and Muniz rely on Mariana’s statement to Muniz after Muniz struck Duran with the hammer that the fight between Camacho and Duran was a family matter, and Muniz’s response that he was there to back up his brother-in-law.

Viewing the evidence in the light most favorable to the prosecution, substantial evidence supports the jury’s gang

enhancement findings. The evidence demonstrates that the dispute between Camacho and Duran began as, and the first fight concerned, a family matter. Prior to the second fight, however, that dispute turned into a gang matter.

After the first fight, Duran, an inactive CV70 gang member, jumped over the fence and attempted to contact his friend Luis, a CV70 gang member. Camacho, a CV3 gang member, spoke with Maribel, also a CV3 gang member. After that conversation, Maribel went inside the house and made a phone call during which she said, “Well, Stomper got down with Wolf from 70s, and because Jose had run across the street.” She said, “[H]e is from 70s, and because Stomper from CV3, it is a hood matter now.” She further said, “Hey, there is shit going down with the 70. You need to come through. This is CV3 all the way.” Maribel then obtained the key and opened the property’s gate, allowing CV3 gang member Muniz to enter the property. During the second fight, Camacho “locked” up Duran and turned him around so his fellow gang member Muniz could strike him with a hammer. When Duran fell to the ground, Camacho punched him in the face while Muniz struck him with the hammer.

In addition, Muniz admitted the attack was gang-motivated. After Mariana refused Muniz’s demand to bring out Duran from her and Duran’s room after the second fight, she and Muniz calmed down and had a conversation. Apart from claiming he was there to back up his brother-in-law, Muniz said “[h]e received a call saying because Jose was from 70s and he was from, I guess, a different gang, Mr. Camacho, that is why he was there.”

Given a set of hypothetical facts based on this case, Detective Gomez, the prosecution's gang expert, testified that the offenses were committed for the benefit of a gang. Once the girlfriend in the hypothetical made the phone call in which she referred to a rival gang and said, "[T]his is a hood thing," the dispute became a gang incident. The third Blue gang member was working in association with the first Blue gang member.

D. *The Prosecution's Use of Camacho's Bifurcated Prior Conviction to Prove the Gang Allegations*

Camacho contends the trial court abused its discretion under Evidence Code section 352 when it permitted the prosecution to use one of his bifurcated prior convictions as a predicate offense in proving the gang allegation. The trial court did not err.

1. Background

The amended information alleged that Camacho suffered two prior serious and/or violent felonies (§§ 667, subds. (a)(1), (b)-(j) & 1170.12, subd. (b)) for which he served two prior prison terms (§ 667.5, subd. (b)) in case number TA103141, assault with a firearm (§ 245, subd. (a)(2)), conviction date October 15, 2008, and case number TA117551, assault with a deadly weapon other than a firearm (§ 245, subd. (a)(1)), conviction date July 14, 2011. The trial court granted Camacho's motion to bifurcate the trial on the prior conviction and prison term allegations.

Prior to Detective Gomez's testimony, Camacho's counsel requested a sidebar conference at which he objected under

Evidence Code section 352 to the prosecution's use of Camacho's prior conviction in case number TA103141 as a predicate offense in proving the gang allegation. Counsel argued that because the conviction was nearly 10 years old and the record of conviction did not include a gang allegation, the prejudice from using that conviction substantially outweighed its relevance. If, however, the trial court permitted the prosecution to use that prior conviction, then Camacho's counsel asked the trial court to give the jury a limiting instruction.

The prosecutor argued that any prejudice from the prior conviction was lessened because there was no gang allegation in that case. Also, the assault charge in this case did not allege Camacho used a firearm. The prosecutor agreed that the trial court should give the jury a limiting instruction.

The trial court permitted the prosecution to use Camacho's prior conviction as a predicate offense for proving the gang allegations. It reasoned that the conviction's prejudicial impact was lessened because the conviction was nine years prior to the incident in this case and thus "it could be argued it [was] remote" The court stated it would give the jury a limiting instruction telling the jury it could use Camacho's prior conviction only for the gang allegations and not for any other purpose.⁴

⁴ The trial court instructed the jury with CALJIC No. 17.24.3 as follows:

"Evidence has been introduced for the purpose of showing criminal street gang activities, and of criminal acts by gang members, other than the crimes for which defendants are on trial.

"This evidence, if believed, may not be considered by you to prove that defendant is a person of bad character or that he has a

During Detective Gomez’s testimony, the prosecution introduced evidence about two crimes committed by CV3 gang members: (1) Steve Granada’s conviction “in case [number] TA104737 for the crime of [] section 12021 subsection (a) subsection (1), committed on or about January 20, 2009,” and (2) Camacho’s conviction in case number TA103141 for the “crime of [] section 245[, subdivision](a)(2), commonly known as assault with a [semiautomatic] on or about October 11th, 2008.”

2. Analysis

Evidence Code section 352 provides: “The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury.” A determination of inadmissibility of evidence under Evidence Code section 352 requires the balancing of the probative value of the evidence against its potential prejudicial effect. (*People v. Ewoldt* (1994) 7 Cal.4th 380, 404–

disposition to commit crimes. It may be considered by you only for the limited purpose of determining if it tends to show that the crime or crimes charged were committed for the benefit of, at the direction of, or in association with a criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members.

“For the limited purpose for which you may consider this evidence, you must weigh it in the same manner as you do all other evidence in the case.

“You are not permitted to consider such evidence for any other purpose.”

405.) We review a trial court’s ruling under Evidence Code section 352 for an abuse of discretion. (*People v. Lewis* (2001) 25 Cal.4th 610, 637.) “A trial court abuses its discretion when its ruling ‘fall[s] “outside the bounds of reason.”’ [Citations.]” (*People v. Waidla* (2000) 22 Cal.4th 690, 714.)

In proving the gang allegations, the prosecution was required to prove that CV3 was a criminal street gang. To prove CV3 was a criminal street gang, the prosecution was required to show, among other things, that CV3’s “members individually or collectively engage in, or have engaged in, a pattern of criminal gang activity.” (§ 186.22, subd. (f).) “Pattern of criminal gang activity” under the gang statute is defined, as relevant here, as the “commission of . . . or conviction of two or more of the following offenses . . . : [¶] (1) Assault with a deadly weapon . . . as defined in [s]ection 245.” (§ 186.22, subd. (e).)

Subject to Evidence Code section 352, the prosecution may use proof of an offense a defendant committed on a separate occasion to establish a predicate offense for a gang allegation. (*People v. Tran* (2011) 51 Cal.4th 1040, 1046–1047.) Camacho challenges the prosecution’s use of his prior conviction “when, most assuredly, there were offenses from other gang members from which to choose.” As Camacho concedes, however, we are bound to follow the Supreme Court’s holding in *People v. Tran*, *supra*, 51 Cal.4th at page 1049, which permits the prosecution to use a charged defendant’s prior offense even if it could prove the predicate offense through evidence of an offense committed by another gang member on a separate occasion. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)

Here, the prosecution used Camacho’s section 245 assault with a firearm conviction in case number TA103141 to prove one

of the required predicate offenses for the gang allegations. That conviction was relevant,⁵ highly probative to the prosecution's gang allegation case, and not substantially outweighed by any prejudice to Camacho. The prior offense was nearly 10 years old, there was no gang allegation in that case, and the assault charged in Camacho's current case did not involve a firearm. Accordingly, the trial court's ruling permitting the prosecution to use defendant's prior conviction to establish a predicate offense for the gang allegations was not outside the bounds of reason and not an abuse of discretion. (*People v. Waidla, supra*, 22 Cal.4th at p. 714.)

E. *Senate Bill No. 1437*

Camacho contends we must vacate his willful, deliberate, and premeditated attempted murder conviction, which rested on a natural and probable consequences theory of aiding and abetting, in light of Senate Bill No. 1437. We adhere to our holding in *People v. Martinez* (2019) 31 Cal.App.5th 719, 729, that Senate Bill No. 1437's enactment of the petitioning procedure in section 1170.95 dictates that the changes worked by the legislation do not apply retroactively on direct appeal. Camacho is entitled to pursue the procedure set forth in section 1170.95, but he is not entitled to Senate Bill No. 1437 relief without doing so. If Camacho chooses to pursue such relief, the

⁵ Evidence is relevant when it has "any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." (Evid. Code, § 210.)

trial court may decide whether Senate Bill No. 1437 applies to attempted murder convictions.⁶

F. *The Trial Court's Failure to Instruct on Premeditation*

Camacho contends we must reverse his conviction for willful, deliberate, and premeditated attempted murder because the trial court erred in failing to instruct the jury that premeditation is an element of attempted murder. We reject Camacho's argument as we are bound by existing California Supreme Court authority to the contrary.

1. Background

The trial court instructed the jury that it could convict Camacho of attempted murder as a direct perpetrator, a direct aider and abettor, or an aider and abettor under the natural and probable consequences doctrine. (CALJIC Nos. 3.00 [Principals—Defined]; 3.01 [Aiding and Abetting—Defined]; 3.02 [Principals—Liability for Natural and Probable Consequences].⁷)

⁶ This issue is currently pending before the California Supreme Court. (*People v. Lopez* (Aug. 21, 2019, B271516, review granted Nov. 13, 2019, S258175) [rehearing petition granted on two questions, including: “Does Senate Bill No. 1437 (Stats. 2018, ch. 1015) apply to attempted murder liability under the natural and probable consequences doctrine?”].)

⁷ Specifically, the trial court instructed the jury on the natural and probable consequences theory as follows: “One who aids and abets another in the commission of a crime is not only guilty of that crime but is also guilty of any other crime

The trial court also instructed the jury that if it found defendant guilty of attempted murder, it must next determine whether the attempted murder was willful, deliberate, and premeditated. (CALJIC Nos. 8.66 [Attempted Murder] and 8.67 [Attempted Murder—Willful, Deliberate, and Premeditated].) The court did not instruct the jury that it was required to find that Camacho personally acted willfully, deliberately, or with premeditation.

During closing argument, the prosecutor argued that the jury could convict Camacho of attempted premeditated murder

committed by a principal which is a natural and probable consequences of the crime original aided and abetted.

“In order to find the defendant guilty of the crime of attempted murder, as charged in count 3, you must be satisfied beyond a reasonable doubt that:

“1. The crime of assault with a deadly weapon was committed.

“2. That the defendant aided and abetted that crime.

“3. That a co-principal in that crime committed the crime of attempted murder; and

“4. The crime of attempted murder was a natural and probable consequence of the commission of the crime of assault with a deadly weapon.

“In determining whether a consequence is natural and probable, you must apply an objective test, based not on what the defendant actually intended, but on what a person of reasonable and ordinary prudence would have expected likely to occur. The issue is to be decided in light of all of the circumstances surrounding the incident.

“A natural consequence is one which is within the normal range of outcome that may . . . reasonably be expected to occur if nothing unusual has intervened.

“Probable means likely to happen.”

under a natural and probable consequences theory: “Mr. Camacho thought all along, all that is going to take place is an assault, that they were just going to beat up on Mr. Duran. If Mr. Muniz had any other intention, regardless of whether Mr. Camacho knows what he is going to do, Mr. Camacho is on the hook for that. So again, it’s a natural and probable—does a reasonable person, what they think, if someone is going to beat up a human being with a dangerous or deadly weapon, could they possibly kill them? Of course, depending on where they hit them, depending on how many times they hit them. So in this case, I don’t need to show to you that Mr. Camacho had the personal intent that he personally wanted to kill Jose Duran or even that he knew that Mr. Muniz came over there and was going to kill him. That is not what the law requires, because as soon as they enter into the agreement to attack [Duran] and to assault him, anything that happens that is reasonable, anything that is a natural and probable consequence of that, he is on the hook for. That’s why this rule applies, even if the act was not [a part] of the original plan. [¶] Again, members of the jury, that is exactly why Mr. Camacho is also, and he is guilty of the attempted murder, and that is premeditated, deliberate, and willful. They worked and acted as a team in this case.”

2. Standard of Review

Camacho contends that the trial court erred in instructing the jury that it could convict him of aiding and abetting attempted premeditated murder under a natural and probable consequences theory, without finding that he acted willfully, deliberately, or with premeditation. We apply the de novo

standard of review when assessing whether jury instructions correctly state the law. (*People v. Posey* (2004) 32 Cal.4th 193, 218.)

3. Analysis

In support of his argument, defendant cites *People v. Chiu* (2014) 59 Cal.4th 155, 167 (*Chiu*), in which the California Supreme Court concluded that a first degree, premeditated and deliberate murder conviction for an aider and abettor cannot be based on the natural and probable consequences doctrine as a matter of law. Defendant concedes that *Chiu* did not extend its holding to attempted murder convictions and also concedes that his argument is contrary to the California Supreme Court's opinions in *People v. Favor* (2012) 54 Cal.4th 868, 880 ["Under the natural and probable consequences doctrine, there is no requirement that an aider and abettor reasonably foresee an attempted premeditated murder as the natural and probable consequences of the target offense. It is sufficient that attempted murder is a reasonably foreseeable consequence of the crime aided and abetted, and the attempted murder itself was committed willfully, deliberately and with premeditation"] (*Favor*) and *People v. Lee* (2003) 31 Cal.4th 613, 629 ["section 664[, subdivision](a) requires only that the murder attempted was willful, deliberate, and premeditated, but not that an attempted murderer personally have acted with willfulness, deliberation, and premeditation even if he or she is guilty as an aider and abettor"] (*Lee*), both of which were cited but not overruled by *Chiu*.

There is a split of authority as to whether *Chiu*'s holding applies to premeditated attempted murder convictions. (Compare *People v. Mejia* (2019) 40 Cal.App.5th 42, 43 [concluding that the trial court "improperly instructed the jury on premeditated attempted murder under the natural and probable consequences doctrine"] with *People v. Gallardo* (2017) 18 Cal.App.5th 51, 85 ["[s]imply put, there is no language in *Chiu* that overrules or otherwise questions the continuing validity of *Lee* or *Favor*"].) This issue is currently pending before the California Supreme Court. (*People v. Lopez* (Aug. 21, 2019, B271516, review granted Nov. 13, 2019, S258175) [rehearing petition granted on two questions, including: "In order to convict an aider and abettor of attempted willful, deliberate and premeditated murder under the natural and probable consequences doctrine, must a premeditated attempt to murder have been a natural and probable consequence of the target offense? In other words, should [*Favor, supra*,] 54 Cal.4th 868 . . . be reconsidered in light of *Alleyne v. United States* (2013) 570 U.S. 99 . . . [*Alleyne*] and [*Chiu, supra*,] 59 Cal.4th 155 . . . ?"].)

The Attorney General counters that we are bound by stare decisis to follow *Favor* and *Lee*, and affirm the conviction for attempted premeditated murder. (*People v. Johnson* (2012) 53 Cal.4th 519, 528; *Auto Equity Sales, Inc. v. Superior Court, supra*, 57 Cal.2d at p. 455.) We are persuaded by the Attorney General's argument that we are bound by *Favor* and *Lee*. (*Auto Equity Sales, Inc., supra*, 57 Cal.2d at p. 455.)

Defendant also argues that the United States Supreme Court's holding in *Alleyne, supra*, 58 U.S. at page 33, undermines *Favor* and *Lee*. Again, we are bound to follow *Favor* and *Lee*. As we note, the continuing viability of *Favor* and *Lee* is a matter that

is currently pending before the California Supreme Court. (*People v. Lopez* (Aug. 21, 2019, B271516, review granted Nov. 13, 2019, S258175.)

G. *Senate Bill No. 1393*

Camacho's counsel asked the trial court to strike the section 667, subdivision (a) five-year sentence enhancement on both of Camacho's convictions. At the time, imposition of those enhancements was mandatory, and the trial court declined defense counsel's request. Senate Bill No. 1393, which became effective on January 1, 2019, amended sections 667 and 1385 to give the trial court discretion to strike five-year sentence enhancements under section 667, subdivision (a) in furtherance of justice. Camacho contends that in light of Senate Bill No. 1393, we should remand this matter to the trial court to allow it to decide whether to strike his section 667, subdivision (a) sentence enhancements. The Attorney General agrees as do we.

H. *Imposition of 10-Year Gang Sentence Enhancement*

The trial court sentenced Camacho to 25 years to life for his willful, deliberate, premeditated attempted murder conviction. (§§ 664/187, subd. (a).) To that sentence, the trial court imposed a consecutive 10-year gang sentence enhancement pursuant to section 186.22, subdivision (b)(1)(C). Because his attempted murder conviction carried a life term, Camacho contends the trial court should have imposed a 15-year minimum parole eligibility term on the gang finding under section 186.22, subdivision (b)(5)

rather than the 10-year term under section 186.22, subdivision (b)(1)(C). The Attorney General agrees as do we.

The Attorney General points out that the trial court erred in sentencing Muniz to the 10-year gang sentence enhancement instead of to a 15-year minimum parole eligibility term—an issue Muniz did not raise on appeal. We agree.

I. *Senate Bill No. 136*

On October 8, 2019, the Governor signed Senate Bill No. 136, which became effective on January 1, 2020. Senate Bill No. 136 amended section 667.5, subdivision (b) to provide, in relevant part: “Except where subdivision (a) applies, where the new offense is any felony for which a prison sentence or a sentence of imprisonment in a county jail . . . is imposed or is not suspended, in addition and consecutive to any other sentence therefor, the court shall impose a one-year term for each prior separate prison term for a sexually violent offense as defined in subdivision (b) of Section 6600 of the Welfare and Institutions Code” Thus, Senate Bill No. 136 amended section 667.5, subdivision (b) to eliminate the one-year sentence enhancement for prior prison terms other than those imposed for sexually violent offenses.

Camacho contends that Senate Bill No. 136 is retroactive under *In re Estrada* (1965) 63 Cal.2d 740 and that we should strike his two one-year section 667.5, subdivision (b) sentence enhancements as neither of his prior prison terms was served for a sexually violent offense. The Attorney General agrees as do we.

The trial court found that Muniz also had served one prior section 667.5, subdivision (b) term. That term was not served for a sexually violent offense and thus also must be stricken

IV. DISPOSITION

Camacho's and Muniz's section 667.5, subdivision (b) prior prison term sentence enhancements are reversed. The matter is remanded for the trial court to consider whether to exercise its discretion to strike Camacho's section 667, subdivision (a) sentence enhancements and for the court to strike Camacho's and Muniz's section 186.22, subdivision (b)(1)(C) 10-year terms and impose 15-year minimum parole eligibility terms under section 186.22, subdivision (b)(5). The judgments are otherwise affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

KIM, J.

We concur:

BAKER, Acting P. J.

MOOR, J.

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BAKER, Acting P. J., Concurring

I join the opinion for the court and write separately only to offer an observation concerning our Supreme Court's decision in *People v. Tran* (2011) 51 Cal.4th 1040 (*Tran*). In short, I believe it would be helpful for our Supreme Court to clarify the parameters of the Evidence Code section 352 analysis a trial court is to undertake when the People seek to use a prior conviction of the defendant then being tried to prove a criminal street gang predicate offense.

The holding in *Tran* is summarized at the outset of the opinion: "A criminal street gang is any ongoing association that has as one of its primary activities the commission of certain criminal offenses and engages through its members in a 'pattern of criminal gang activity.' [Citations.] A pattern of criminal gang activity is 'the commission of, attempted commission of, conspiracy to commit, or solicitation of, sustained juvenile petition for, or conviction of two or more' specified criminal offenses within a certain time frame, 'on separate occasions, or by two or more persons' (the 'predicate offenses'). [Citations.] We hold that a predicate offense may be established by evidence of an offense the defendant committed on a separate occasion. Further, that the prosecution may have the ability to develop evidence of predicate offenses committed by other gang members

does not require exclusion of evidence of a defendant's own separate offense to show a pattern of criminal gang activity.” (*Tran, supra*, 51 Cal.4th at p. 1044.)

The *Tran* opinion goes on to elaborate on this holding: “Defendant argues that evidence of a defendant's separate offense on another occasion should not be admitted when it is ‘cumulative.’ By this he seems to mean that the evidence should not be admitted when the prosecution has the ability to develop evidence of offenses committed on separate occasions by other gang members. But defendant cites no authority for the argument that the prosecution must forgo the use of relevant, persuasive evidence to prove an element of a crime because the element might also be established through other evidence. The prejudicial effect of evidence defendant committed a separate offense may, of course, outweigh its probative value if it is merely cumulative regarding an issue not reasonably subject to dispute. [Citations.] But the prosecution cannot be compelled to “‘present its case in the sanitized fashion suggested by the defense.” [Citation.] When the evidence has probative value, and the potential for prejudice resulting from its admission is within tolerable limits, it is not *unduly* prejudicial and its admission is not an abuse of discretion. . . . That the prosecution might be able to develop evidence of predicate offenses committed by other gang members therefore does not require exclusion of evidence of a defendant's own separate offense to show a pattern of criminal gang activity.” (*Tran, supra*, 51 Cal.4th at pp. 1048-1049.)

While our Supreme Court has said that a trial court is not *required* to exclude evidence of a defendant's own separate offense even if the prosecution can develop evidence of predicate offenses committed by other gang members, it would be helpful to

clarify that consideration of the prosecution's alternative means of proof still may *inform* a trial court's Evidence Code section 352 judgment about whether a defendant's own prior conviction should be admitted as proof in support of an alleged gang enhancement. If the prosecution has a ready means of proving a plethora of qualifying predicate offenses committed by gang members other than the defendant on trial, a decision to select a prior conviction of the defendant being tried to prove a predicate offense raises an inference that the selection is being made because of (or somehow ignorant of) the prejudicial impact the prior conviction may have on the jury. (See generally *Tran*, *supra*, 51 Cal.4th at p. 1047 ["Without doubt, evidence a defendant committed an offense on a separate occasion is inherently prejudicial"].) Directing trial courts to consider whether there is reason to draw this inference in a particular case (and whether the inference is rebutted by considerations identified by the People) does not compel a "sanitized" prosecution. Quite the contrary: it provides an appropriate safeguard to ensure a defendant's guilt rests on evidence that proves the charges at hand, not his or her prior criminal history.

BAKER, Acting P. J.